

SOCCKER OR FOOTBALL: THE LEVEL PLAYING FIELD IDEA FOR THE EUROPEAN SINGLE MARKET IN THE AUDIOVISUAL MEDIA SERVICES*

Dr Hab. Katarzyna Klafkowska-Waśniowska[†]

The single market idea is based on the four freedoms, which includes the free provision of services. The Audiovisual Media Services Directive (AVMSD) aims to eliminate the barriers related to content of audiovisual media services. The idea of a level playing field is combined in the AVMSD with the establishment of a common European market for audiovisual content and the principles of fair competition and equal treatment. This creates comparable treatment of comparable services and is very difficult to implement in practice.

This article discusses the problems of delineating comparable services and imposing comparable obligations on their providers. As the scope of the AVMSD is broad, the focus of this article is on the provisions that help explain the idea of a level playing field for audiovisual services in the context of the proposal for its revision and inclusion of video sharing platform operators within the AVMSD scope. Concluding remarks point to the impact of a level playing field approach on the application of the country of origin principle as the cornerstone of the AVMSD and a basic tool to ensure free movement of audiovisual media and information society services.

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† Dr Hab. Katarzyna Klafkowska-Waśniowska is an Assistant Professor at the European Law Department, Faculty of Law and Administration at Adam Mickiewicz University in Poznań, Poland.

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I. Introduction

No matter if we talk about soccer or football, both European and American players may agree they need to compete on a level playing field. What does the idea of a level playing field mean for the audiovisual industry, and what impact does it have for American companies expanding their offers to the European Union (EU) market? The single market idea is based on the liberalization of trade; however, ensuring free movement of audiovisual media services is particularly difficult because of its cultural meaning.¹ In 2016, EU Commission Vice President, Andrus Ansip, stated that the goal for the audiovisual single market is “to strengthen Europe’s creative industry in the digital age; . . . to boost the circulation of European works; and . . . to help European cinema reach a wider audience.”² Legislative changes in two major areas are required for this to occur – media regulation and copyright.³ In the media regulation, a goal and explanation for a planned reform creates a level playing field in the audiovisual media services.⁴

1. Irini Katsirea, *The Future of Public Service Obligations After the AVMS Directive*, 3–4 INFOAMÉRICA: IBEROAMERICAN COMM. REV., 249, 249 (2010); see also Mira Burri-Nenova, *Cultural Diversity and the EC Audiovisual Media Services Directive: Beyond the Handsome Rhetoric* 1, 2 (NCCR Trade Regulation: Swiss Nat’l Ctr. of Competence in Research, Working Paper No. 2009/9), https://www.tilburguniversity.edu/upload/c428b83c-2f2f-4389-9dd6-54260c5873f3_burri.pdf; see generally Mira Burri-Nenova, *The New Audiovisual Media Services Directive: Television Without Frontiers, Television Without Cultural Diversity*, 44 COMMON MKT. L. REV. 1689 (2007) (these are examples of the importance of the cultural aspects of the AVMSD).

2. Andrus Ansip, EU Commission Vice President, Speech by European Commission Vice-President Ansip at the 69th Cannes Film Festival (May 15, 2016), http://europa.eu/rapid/press-release_SPEECH-16-1781_en.htm.

3. In the Digital Single Market Strategy, the initiatives concerning copyright changes for better access to digital content and the media framework for the 21st century are included. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe*, at 6, 10, COM (2015) 192 final (June 5, 2015).

4. *Right Environment for Digital Networks and Services*, EUR. COMMISSION, <https://ec.europa.eu/digital-single-market/node/78516> (last visited Oct. 14, 2017). The legislative package included a proposal for a directive that was presented in May 2016. *Id.*

This article discusses the rules of the game for audiovisual service providers on the European field and focuses on the provisions of the Audiovisual Media Services Directive (AVMSD), including its proposed revision.⁵ Section II will discuss the principles of the single market with respect to audiovisual services. In this context, the idea to a level playing field is analysed in Section III as a justification to broaden the scope of regulation in the AVMSD. Sections IV and V, respectively, discuss the existing and proposed obligations of audiovisual media service providers to promote European works and of audiovisual media service providers and video sharing platform operators in the sphere of protection of minors.

II. THE IDEA OF THE SINGLE MARKET FOR AUDIOVISUAL SERVICES

The European Single Market (the Single Market) is based on four freedoms – the free movement of goods, services, workers, and capital.⁶ The freedom to provide services in other EU Member States is, in the age of electronic communication, a prominent one because it covers e-commerce, media, telecommunication sectors, and more.⁷ According to Article 56 of the Treaty on the Functioning of the European Union (TFEU), restrictions on freedom to provide services by the nationals of Member States who are established in a different Member State than that of the recipient of the service are prohibited.⁸ This rule means that a Member State must allow reception of services provided on a transfrontier basis.⁹ This freedom applies not only to EU nationals but

5. See *Proposal for a Directive of the European Parliament and of the Council Amending Directive 2010/13/EU on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services in View of Changing Market Realities*, COM (2016) 287 final (May 25, 2016) [hereinafter *Proposal for the AVMSD Revision*]; see generally Council Directive 2010/13, 2010 O.J. (L 95) 1 (EU).

6. Consolidated Version of the Treaty on the Functioning of the European Union art. 26, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. The separation between free provisions of services and freedom of establishment as the fifth freedom is not outlined in article 26 of TFEU. See *id.*

7. It includes all activities that are covered by the concept of “a service” within the meaning of article 57 TFEU. See *id.* art. 57.

8. *Id.* art. 56.

9. See *id.*

also to companies or firms that are formed in accordance with the law of a Member State and have a “registered office, central administration or principal place of business within the [EU].”¹⁰ Exceptions to the principle of free movement exists in TFEU and may be invoked when a Member State acts to protect public security, public policy, and health.¹¹ The Court of Justice of the European Union (CJEU) was highly active in the 1970s and 1980s in removing barriers to trade, primarily from the law of Member States.¹² According to the CJEU, “[i]t is settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedoms guaranteed by Articles 49 TFEU and 56 TFEU must be regarded as restrictions on the freedom of establishment and/or the freedom to provide services.”¹³ Furthermore, Member States may invoke mandatory requirements to restrict the free movement of services if these services are non-discriminatory measures justified with compelling reasons related to the public interest.¹⁴ As the CJEU explains, “in a sector which has not been subject to full harmonisation at Community level, Member States remain, in principle, competent to define the conditions for the pursuit of the activities in that sector, they must, when exercising their powers, respect the basic freedoms guaranteed by the EC Treaty,”¹⁵ such as the freedom to provide services. The audiovisual sector is subject to a certain degree of harmonisation; for example, the Television Without Frontiers Directive (TVWF Directive), and then the AVMSD, provide for coordination of laws of the Member States and for

10. *Id.* art. 54.

11. *Id.* arts. 52, 62.

12. For cases fundamental in the broadcasting sector, see Case 155/73, Giuseppe Sacchi, 1974 E.C.R. 411; *see also* Case 52/79, Procureur du Roi v. Debauve, 1980 E.C.R. 834; *see also* Case C-288/89, Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media, 1991 E.C.R. I-4035.

13. Case C-463/13, Stanley Int’l Betting Ltd. v. Ministero dell’Economia e delle Finanze, CURIA (Jan. 22, 2015), ¶ 43, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=161612&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3249594>.

14. *See Gouda*, Case C-288/89, ¶¶ 13–15.

15. Case C-438/08, Comm’n of the European Cmty.’s v. Portuguese Republic, CURIA (Oct. 22, 2009), ¶ 27, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=76389&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3254188>.

harmonisation of the regulations applicable to audiovisual content and aim to ensure freedom of cross-border provision of services.¹⁶

The TVWF Directive introduced a rule that a broadcaster should be subject to control only in one Member State.¹⁷ Other Member States may not restrict the retransmission and reception of such broadcasts on their territories for reasons falling in the scope of areas coordinated by the TVWF Directive.¹⁸ This country of origin principle is key in the single market for audiovisual services and is maintained in the AVMSD of 2007.¹⁹ The AVMSD is applicable not only to broadcasts but to all audiovisual media services.²⁰ Only the audiovisual media services that satisfy minimum standards imposed by the AVMSD can circulate freely.²¹ These standards include the ban of incitement to hatred, protection of minors, promotion of European works, and standards for commercial communications, which includes television advertising, surreptitious commercial communication, sponsorship, and product placement.²² Member States are obliged to control audiovisual media services providers' compliance with the obligations implemented in national law.²³ In exceptional cases, as provided for in the AVMSD, the Member State may temporarily restrict the reception of the service from another Member State.²⁴ The grounds for application of such exceptional

16. Irini Katsirea, *The Television Without Frontiers Directive*, in THE PALGRAVE HANDBOOK OF EUROPEAN MEDIA POLICY 297, 297–309 (Karen Donders et al. eds., 2014).

17. Council Directive 89/552/EEC, art. 2, 1989 O.J. (L 289) 23, 26 [hereinafter TVWF].

18. *Id.* art. 2(2).

19. *Impact Assessment*, at 3, COM (2016) 287 final (May 25, 2016); *see also* Council Directive 2010/13/EU, of the European Parliament and of the Council of 10 March 2010, 2010 O.J. (L 95) 1 [hereinafter AVMSD]. The AVMSD was enacted in 2007 and codified in 2010. *Id.*

20. Audiovisual media service is defined in article 1 of the AVMSD. *Id.* art. 1. According to article 2(2), for the purpose of the AVMSD, media service providers under the jurisdiction of a Member State are those established in that Member State, according to the criteria set in the article 2(3), or those using the satellite up-link or satellite capacity appertaining to that Member State, according to article 2(4). *Id.* art. 2. If the jurisdiction cannot be determined according to article 2(3) or 2(4), the criterion of “establishment” from TFEU is applicable. TFEU arts. 49–55.

21. *See* AVMSD arts. 2, 3.

22. *See id.* arts. 6, 9, 12, 13, 16, 19, 27.

23. *Id.* art. 2.

24. *Id.* art. 3.

derogatory measures are detailed in Articles 3(2) and 3(4) of the AVMSD and narrow the possibilities for restricting free movement of services, in comparison with the TFEU.²⁵ The country of origin principle is considered an effective tool for achieving the free circulation of services,²⁶ especially in traditional forms of broadcasting.²⁷ The basic idea of the single market for audiovisual media services is that there are no barriers for retransmission and access to audiovisual media services as long as the standards set in the AVMSD are satisfied.

From the preamble of the AVMSD and the speech of EU Commission Vice President Ansip preceding the presentation of a proposal for a reform,²⁸ it can be interpreted that the EU idea of a single market for audiovisual services is not only about eliminating barriers. The AVMSD sets a goal as a “transition from national markets to a common programme production and distribution market.”²⁹ If such an objective means, as might be reasonably expected, more European production, stimulating interest in European content, reaching a wider audience, and boosting the circulation of European works, questions about the demand, exposure, and financing of audiovisual works should be asked. Not all of these issues are dealt with in the AVMSD, but some of its provisions aim at satisfying these goals.³⁰ In the AVMSD, the “true European market for

25. Compare *id.* art. 3, with TFEU arts. 52, 62 (the grounds for limitation of the freedom to provide services are more broadly worded in article 52 as public policy, public security, and public health).

26. *Impact Assessment*, *supra* note 19, at 3.

27. *Executive Summary of the Ex-Post REFIT Evaluation of the Audiovisual Media Services Directive 2010/13/EU*, at 3, SEC (2016) 171 final (May 25, 2016); see also Michael Wagner, *Revisiting the Country-of-Origin Principle in the AVMS Directive*, 6 *J. Media L.* 286, 288 (2014).

28. Speech by European Commission Vice-President Ansip at the 69th Cannes Film Festival, *supra* note 2.

29. AVMSD recital 2.

30. For questions of access to and financing of audiovisual works, copyright issues are essential. New solutions were also proposed in this field, but discussing those proposals is beyond the scope of this article. For a discussion on the package of proposals, see *Towards a Modern, More European Copyright Framework: Commission Takes First Steps and Sets Out Its Vision to Make It Happen*, EUR. COMMISSION (Sept. 12, 2015), <https://ec.europa.eu/digital-single-market/en/news/towards-modern-more-european-copyright-framework-commission-takes-first-steps-and-sets-out-its>.

audiovisual media services” is combined with the idea of a level playing field, principles of fair competition, and equal treatment.³¹

Once again returning to the football metaphor, an additional question to ask is who are the players we are talking about? Three major groups should be discussed. The first two are the audiovisual media service providers of linear (television) and non-linear (on-demand) services, as defined in the AVMSD.³² The third group consists of information society service providers within the meaning of the E-Commerce Directive,³³ as long as service providers engage in the communication of audiovisual content and are not covered by the AVMSD as audiovisual on-demand media services providers.³⁴ The E-Commerce Directive includes and covers, for example, platform operators,³⁵ providers of hosting services, or other intermediaries providing access to audiovisual content that do

31. AVMSD recital 10.

32. A media service provider is defined as a “natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised.” AVMSD art. 1(1)(d).

33. Service provider is defined as “any natural or legal person providing an information society service.” Directive 2000/31/EC, on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1, 11 [hereinafter E-Commerce Directive].

34. Professors Peggy Valcke and Eva Lievens point to a category of content distributors, intermediaries in offering audiovisual content forgotten in the AVMSD. See Peggy Valcke & Eva Lievens, *Rethinking European Broadcasting Regulation: The Audiovisual Media Services Directive Unraveled at the Dawn of the Digital Public Sphere*, in *RETHINKING EUROPEAN MEDIA AND COMMUNICATIONS POLICY* 127, 154–55 (Caroline Pauwels et al. eds., 2009) [hereinafter *The Audiovisual Media Services Directive Unraveled at the Dawn of the Digital Public Sphere*]. Practitioner Alexander Scheuer points that the role of platform operators and providers of “bundled services.” See Alexander Scheuer, *Are the Guards Stationed at the Right Portals?: The Suitability of Regulations on the Promotion of European Works in Non-linear Audiovisual Media Services*, in *VIDEO ON DEMAND AND THE PROMOTION OF EUROPEAN WORKS* 47, 49 (Susanne Nikoltshev ed., 2013) (pointing out that the role of platform operators and providers of “bundled services” in the promotion of European Works). The proposal for AVMSD revision, however, does not contain any provisions on the promotion of European Works by the platform providers. See generally *Proposal for the AVMSD Revision*, *supra* note 5.

35. In the discussion about changes in the EU law, it is pointed out that the term “online platforms” is broad and undefined. See Francisco Javier Cabrera Blázquez et al., *VOD, PLATFORM AND OTT: WHICH PROMOTION OBLIGATIONS FOR EUROPEAN WORKS?* 30 (2016) [hereinafter *VOD, PLATFORM AND OTT*].

not qualify as audiovisual media service providers.³⁶ This article discusses the obligations already imposed on those service providers and those proposed by the European Commission. As the scope of the AVMSD is broad,³⁷ the focus of this article is on the provisions that help explain the idea of a level playing field for audiovisual services. This article also discusses the current changes in legal framework regarding audiovisual services.

III. AUDIOVISUAL MEDIA SERVICES DIRECTIVE AND THE CONVERGENCE OF THE MEDIA

The TVWF Directive was fundamentally revised because the technological landscape in the media sector changed with the advent of digital and internet transmissions.³⁸ The rationale behind expanding the scope from television to “all audiovisual media services” was to level the playing field.³⁹ *Mediakabel*, a case decided by the CJEU in 2005, is an example of problems with services comparable to television broadcasting.⁴⁰ The question referred for a preliminary ruling concerned the issue of which providers of services offering audiovisual programmes, for example films, have to comply with the obligations imposed by the TVWF Directive.⁴¹ The CJEU delineated between near-video-on-demand services that qualify as broadcasting and video-on-demand services.⁴² Near-video-on-demand services satisfy the conditions of providing television programmes because this video service provides reception by the public and is not provided at the individual request of

36. Recital 18 of the E-Commerce Directive clarifies that information society services cover video-on-demand services but not television and radio broadcasting as they are not provided at individual request. E-Commerce Directive recital 18.

37. See *Audiovisual Commercial Communications: AVMSD*, EUR. COMMISSION (July 6, 2015), <https://ec.europa.eu/digital-single-market/en/audiovisual-commercial-communications-avmsd>.

38. Egbert Dommering in *EUROPEAN MEDIA LAW* 3, 11 (Oliver Castendyk et al. eds., 2008); see also Remy Chavannes in *EUROPEAN MEDIA LAW*, *supra*, at 799, 806.

39. AVMSD recital 11.

40. See generally Case C-89/04, *Mediakabel BV v. Commissariaat voor de Media*, 2005 E.C.R. I-4909.

41. *Id.* ¶¶ 17, 26, 34, 46.

42. *Id.* ¶ 32.

the user.⁴³ The CJEU's reasoning leads to the conclusion that video-on-demand services were not covered by the TVWF Directive because of their on-demand characteristics and the fact that the service provider does not transmit programmes simultaneously to an indeterminate number of viewers.⁴⁴ One of the issues raised in the proceedings, which occurred in the national court of the Netherlands, was the obligation to include the majority of European works in the programme as required by the TVWF Directive.⁴⁵ As video-on-demand services were outside the scope of the TVWF Directive, the providers were not obliged to promote European works under European law.⁴⁶ The CJEU ruled that the concept of "television broadcasting" should be interpreted independently and not in opposition to the concept of "information society services."⁴⁷ Video-on-demand services, however, are not "television broadcasting" but "information society services" and, as such, are subject to the E-Commerce Directive.⁴⁸ The E-Commerce Directive ensures the free circulation of such services in the single market but does not contain provisions on the content of such services.⁴⁹

At the time the *Mediakabel* case was decided, the revision of TVWF Directive was occurring,⁵⁰ and a new term, audiovisual media services, was introduced to expand its scope and complement the E-Commerce Directive. Audiovisual media services consist of two main categories of services – broadcasting (linear) and on-demand (non-linear).⁵¹ The definition of the audiovisual media service is complex. Audiovisual media services refers to the broader notion of a service,⁵² and to the terms

43. *Id.*

44. *Id.* ¶¶ 38–39.

45. *Id.* ¶ 26.

46. *See generally* Directive on Electronic Commerce.

47. *Mediakabel*, 2005 E.C.R. at ¶ 1.

48. *See* E-Commerce Directive recital 18.

49. *Id.* art. 3 (within the framework of the country of origin principle in the article 3 of the E-Commerce Directive). Some of the provisions of the E-Commerce Directive may impact the content of services such as article 6 on commercial communications or article 16(1) concerning the codes of conduct. *Id.* arts. 6, 16(1).

50. *See generally* Valcke & Lievens, *supra* note 34, at 128–41 (describing the process leading to enactment of the AVMSD and major points of discussion).

51. *See* AVMSD arts. 1(1)(e), 1(1)(g). These articles also point to audiovisual commercial communication as an audiovisual media services, but the analysis of that provision is beyond the scope of this paper.

52. *See* TFEU art. 57.

“programme,” “editorial responsibility,” “television broadcasting,” and “on-demand audiovisual media service,” which are defined further in article 1 of the AVMSD.⁵³ In light of these definitions, three conditions are crucial and must be satisfied by an audiovisual on-demand media service.⁵⁴ These three conditions are: the provision of programmes as a principal purpose of the service, the requirement that programmes are comparable to the form and content of television broadcasting included in the definition of a programme, and the existence of editorial responsibility over a service.⁵⁵

The first two conditions were considered by the CJEU in the *New Media Online* case of 2015. In this case, the CJEU considered the question of what is the “principal purpose” of the service where audiovisual or other material is offered.⁵⁶ The Austrian court referred to two preliminary questions, both of which were necessary to decide whether the video section of the online newspaper “Tiroler Tageszeitung online” should be considered an audiovisual on-demand media service.⁵⁷ These questions were vital because the electronic versions of newspapers and magazines are excluded from the scope of the AVMSD in Recital 28 of the preamble, but national regulators differed in their assessment of the video sections and press portals.⁵⁸ The CJEU, interpreting the

53. See AVMSD art. 1.

54. Most often, seven criteria of an audiovisual on-demand media service are identified, but only three are crucial. See Francisco Javier Cabera Blázquez, *On-Demand Services: Made in the Likeness of TV?*, in 2013-4 IRIS PLUS 7, 9 (2013). However, in these seven criteria, the comparability to the form and content of television broadcasting is not always included as a separate criterion as it is a component of the definition of a “programme” in article 1 of the AVMSD. See Peggy Valcke & Jef Ausloos, *Audiovisual Media Services 3.0: (Re)defining the Scope of European Broadcasting Law in a Converging and Connected Media Environment*, in THE PALGRAVE HANDBOOK OF EUROPEAN MEDIA POLICY, *supra* note 16, at 312, 314 [hereinafter *Audiovisual Media Services 3.0*].

55. AVMSD arts. 1(1)(a)(i), 1(1)(b), 1(c).

56. Case C-347/14, *New Media Online GmbH v. Bundeskommunikationssenat*, CURIA (Oct. 21, 2015), ¶ 13, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=170123&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=340781>.

57. See *id.* ¶ 14.

58. Jenny Metzdorf, *The Implementation of the Audiovisual Media Services Directive by National Regulatory Authorities: National Responses to Regulatory Challenges*, J. INTELL. PROP., INFO. TECH. & E-COMMERCE L. 88, 90 (2014); see generally

condition of a principal purpose, did not preclude that a section of a service may be an audiovisual media service.⁵⁹ The condition is that it is independent to the journalistic activity of a website operator and is not “merely an indissociable complement to that activity.”⁶⁰ Short videos that form important parts of video content online, in general, may be qualified as programmes comparable to television programmes; the CJEU pointed to the examples of local news bulletins and sport and entertainment clips.⁶¹ As a result of the judgment, the audiovisual and press sectors should be kept apart for regulatory reasons. The starting point in the approach proposed by the CJEU is that the website contains written articles (text content) and it is then considered whether the audiovisual programmes (video content) on the website is only complementary to the text, which would be similar to photographs accompanying articles.⁶² The question if video content is only complementary to text, photographs, or music remains important for the qualification of services other than the press, such as online radio stations or entertainment portals. The *New Media Online* case is important for the interpretation of the requirements of the principal purpose of the service and comparability with television broadcasting.⁶³ The concept of editorial responsibility from the AVMSD was not explained by the CJEU.⁶⁴ Editorial responsibility is defined as exercising “effective control both

Irini Katsirea, *Electronic Press: ‘Press-Like’ or Television-Like*, 23 INT’L J.L. & INFO. TECH. 134 (2015); see also AVMSD recital 28.

59. See *New Media Online*, ¶¶ 34–35.

60. *Id.* ¶ 37.

61. *Id.* ¶ 24.

62. *Id.* ¶ 12.

63. It has been proposed to delete the comparability requirement in the definition of a programme in the AVMSD revision. *Proposal for the AVMSD Revision, supra* note 5, at 22 (proposed art. 1). “[P]rogramme’ means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider . . . including feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama.” *Id.* (proposed art. 1).

64. A preliminary question concerning the definition of “editorial responsibility” was referred to by the CJEU, but the CJEU found it has no jurisdiction to answer the question referred by a body that is not a tribunal for the purpose of article 267 of TFEU. Case C-517/09, *RTL Belgium SA*, CURIA (Dec. 22, 2010), ¶¶ 1, 48, 49, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83444&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=351653>.

over the selection of the programmes and . . . their organisation in a . . . schedule” or catalogue.⁶⁵

The issues of editorial responsibility and liability of providers are formally separate.⁶⁶ According to Recital 25 of the AVMSD, “[t]his Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC.”⁶⁷ Yet, the case law on the exemption from liability for host providers may serve as an additional explanation of what the AVMSD means is to control the content. In *Papasavvas*, the questions posed by the Cyprus court concerned the scope of the exemption of liability in the dispute on the alleged defamation of Mr. Papasavvas in an article in a daily national newspaper published online.⁶⁸ The CJEU pointed out that in a case of a newspaper publishing company that operates a website with the online version of a newspaper, the operator has the knowledge of the information posted and exercises control over that information.⁶⁹ The case of *Papasavvas* thus serves as an example, confirming that online press providers do, in principle, exercise control over the content posted.

The problems in assessing whether the platform operator is a provider editing a service or only an intermediary is reflected in copyright liability cases. In the dispute between the French broadcaster TF1 and the video sharing portal Dailymotion, the *Tribunal de Grande Instance de Paris* found that Dailymotion plays a double role of editor and host providers.⁷⁰ In cases where there are partnership agreements with the motion film and programme makers and certain users, service providers may qualify as editors.⁷¹ This implies that Dailymotion had the knowledge and control

65. AVMSD art 1(1)(c).

66. See, e.g., E-Commerce Directive art. 14.

67. AVMSD recital 25.

68. Case C-517/09, *Papasavvas v. O Fifeleftheros Dimosia Etairia Ltd.*, CURIA (Sept. 11, 2014), ¶¶ 18, 20, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=157524&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=354024>.

69. *Id.* ¶ 45.

70. *Tribunal de Grande Instance de Paris 3ème chambre, 4ème Section Jugement du 13 septembre 2012*, LEGALIS, (Sept. 17, 2012), <https://www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-paris-3eme-chambre-4eme-section-jugement-du-13-septembre-2012/>.

71. See *id.*

over the videos posted within the framework of those contracts.⁷² In the case of other content, Dailymotion may play a role of host provider, if the provider confines “itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers.”⁷³

For the purpose of the AVMSD, it is hard to find that video sharing platform operators are responsible for selecting and organizing videos. Offering tools for users and automatic classification of content is not sufficient and comparable to editorial decisions.⁷⁴ In light of the *New Media Online* case, a section of a portal may be considered an audiovisual media service and a platform operator may be found to be an audiovisual media service provider of such a dissociable section.⁷⁵ Furthermore, portals, such as YouTube, may be just a platform for the audiovisual media services where one of its users exercises editorial responsibility.⁷⁶ As pointed out by the *Conseil Supérieur de l’Audiovisuel* (CSA), the French Media Regulatory Authority applies different regimes to different parts of one service – one where a platform operator is an editor and one when a platform operator is only hosting user-generated content.⁷⁷

72. *See id.*

73. Case C-324/09, *L’Oréal SA v. eBay International AG*, CURIA (July 12, 2011), ¶ 113, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=107261&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=358591>.

74. *See Impact Assessment, supra* note 19, at 5; *see, e.g., Audiovisual Media Services 3.0, supra* note 54, at 324 (finding YouTube “fall[s] outside the scope of the [AVMSD].”).

75. It was eventually decided by the Austrian court, in light of the *New Media Online* case, that a video section of a newspaper portal is a video-on-demand service. FRANCISCO JAVIER CABRERA BLÁZQUEZ ET AL., *ON-DEMAND SERVICES AND THE MATERIAL SCOPE OF THE AVMSD 51* (2016) [hereinafter *ON-DEMAND SERVICES AND THE MATERIAL SCOPE OF THE AVMSD*].

76. Peggy Valcke & Jef Ausloos, *What If Television Becomes Just an App?: Re-Conceptualising the Legal Notion of Audiovisual Media Service in the Light of Media Convergence*, 21 (ICRI, Working Paper No. 17/2013), <https://ssrn.com/abstract=2375666> (discussing various examples of “channels” on YouTube falling potentially within the scope of the AVMSD).

77. CONSEIL SUPERIEUR DE L’AUDIOVISUEL, *RAPPORT AU GOUVERNEMENT SUR L’APPLICATION DU DECRET NOMBRE 2010 – 1379 54* (Nov. 2013), <http://www.csa.fr/Etudes-et-publications/Les-autres-rapports/Rapport-au-Gouvernement->

The problems with the scope of the AVMSD have grown with the advent of the Smart TV and connected devices. In the first report on the application of the AVMSD, the solutions of the Directive were questioned.⁷⁸ The AVMSD covers linear and non-linear services, setting out two different sets of rules.⁷⁹ There exists a set of provisions applicable to both kinds of services, but in cases of the protection of minors and promotion of European works, the obligations of service providers substantially differ.⁸⁰ Users of Smart TVs, smartphones, and tablets may potentially access those regulated services but also other unregulated services offered online.⁸¹ The television receiver with a broadband internet connection may be treated as a symbol of the latest stage of convergence, putting the European idea of regulation of audiovisual services into question and raising the call for a level playing field again.⁸² After a long process of consultations, the answer—or rather proposed answer—came in May 2016 with the European Commission’s proposed initiative of reform.⁸³

IV. PROMOTION OF EUROPEAN WORKS

The European idea of a single market for audiovisual media services includes measures for purposes of promoting European works, which is

sur-l-application-du-decret-n-2010-1379-du-12-novembre-2010-relatif-aux-services-de-medias-audiovisuels-a-la-demande-SMAD.

78. *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Audiovisual Media Services and Connected Devices: Past and Future Perspectives*, at 3, SEC (2012) 203 final (May 4, 2012) [hereinafter *Audiovisual Media Services and Connected Devices: Past and Future*].

79. Chapter IV provisions are applicable only to on-demand audiovisual media services and Chapter V provisions are applicable to television broadcasting. AVMSD chp. IV, V.

80. AVMSD arts. 5–13, 16, 27.

81. See Katarzyna Klafkowska-Waśniowska, *Connected TV as the Technological Puzzle Call for a Reform of Audiovisual Media Services Directive*, in *LAWYERS IN THE MEDIA SOCIETY: THE LEGAL CHALLENGES OF THE MEDIA SOCIETY* 100, 108 (Ahti Saarenpää & Karolina Sztobryn eds., 2016).

82. See *Proposal for the AVMSD Revision*, *supra* note 5, at 1.

83. European Commission Press Release IP/16/1873, Commission Updates EU Audiovisual Rules and Presents Targeted Approach to Online Platforms (May 25, 2016).

explained in the AVMSD.⁸⁴ In order to facilitate the production of programmes with cultural objectives, it is

necessary to promote markets of sufficient size for television productions in the Member States to recover necessary investments not only by establishing common rules opening up national markets but also by envisaging for European productions, where practicable and by appropriate means, a majority proportion in television broadcasts of all Member States.⁸⁵

It is stressed that audiovisual services are as much an economic service as a cultural service.⁸⁶ The provisions of the AVMSD emphasize audiovisual services' cultural aspect, linked to the objectives of the United Nations Educational, Scientific and Cultural Organization's (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions.⁸⁷ The entry into force of that Convention helped consolidate the EU's stance in the context of the World Trade Organization (WTO) and the General Agreement on Trade in Services (GATS).⁸⁸ Under GATS, exemptions are applicable to audiovisual media services, limiting the application of the Most Favoured Nation principle assuring the non-discrimination of services and service suppliers.⁸⁹ This exemption is read as allowing for measures such as European quotas.⁹⁰ The European Community, now the EU, and Member States have

84. AVMSD recitals 63, 65.

85. *Id.* recital 65.

86. *Id.* recital 5.

87. *Id.* recital 7.

88. See *Commission Staff Working Document on the External Dimension of Audiovisual Policy*, at 8, SEC (2009) 1033 final (July 14, 2009).

89. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, art. 2 (1994).

90. FRANCISO JAVIER CABRERA BLÁZQUEZ ET AL., EUROPEAN AUDIOVISUAL OBSERVATORY, TERRITORIALITY AND ITS IMPACT ON THE FINANCING OF AUDIOVISUAL WORKS 36 (2015) [hereinafter TERRITORIALITY AND ITS IMPACT ON THE FINANCING OF AUDIOVISUAL WORKS].

advocated in the international trade negotiations for the freedom to act in the audiovisual sector in order to preserve cultural diversity.⁹¹

The provisions on the promotion of European works reflect tension between economic and cultural objectives, not only in the international law context, but also in the internal context of the compatibility with the TFEU provisions. The EU's power to harmonise national law is undoubtedly necessary for the realisation of the single market.⁹² This competence to legislate in the field of the internal market is shared with the Member States.⁹³ In the area of cultural policy, however, the purpose of the EU is to "support, coordinate [and] supplement the actions of the Member States."⁹⁴ The AVMSD's main purpose is coordination of laws of Member States concerning the provision of audiovisual media services in order to facilitate taking up and pursuing economic activity with cultural objectives.⁹⁵

Notwithstanding the critique towards so-called "European quotas," most Member States did not object to sustaining the provisions on quotas in broadcasting.⁹⁶ The general idea of obligations concerning European

91. *Commission Staff Working Document on the External Dimension of Audiovisual Policy*, *supra* note 88, at 8; *see also* VOD, PLATFORM AND OTT, *supra* note 35, at 38.

92. "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."

TFEU art. 2(2) (the single market objective could not be achieved solely by the actions of Member States; thus, the internal market field is an area of shared competence).

93. *Id.* art. 4(2).

94. *Id.* art. 6; *see also* ANNA HEROLD, EUROPEAN FILM POLICIES IN EU AND INTERNATIONAL LAW: CULTURE AND TRADE – MARRIAGE OR MISALLIANCE? 72–75 (2010).

95. AVMSD recital 11. The legal basis for the AVMSD is article 53(1), which expressly refers to measures aiming at coordination. *Id.* art. 53(1). This aspect of coordination is reflected in recital 63 of the AVMSD: "Coordination is needed to make it easier for persons and industries producing programmes having a cultural objective to take up and pursue their activities." *Id.* recital 63.

96. *See* Tarlach McGonagle, *The Quota Quandary: An Assessment of Articles 4–6 of the Television Without Frontiers Directive*, in *THE EUROPEAN UNION AND THE CULTURE INDUSTRIES: REGULATION AND THE PUBLIC INTEREST* 187, 187 (David Ward ed., 2008); *see also* Irimi Katsirea, *Cultural Diversity in Broadcasting*, in *MEDIA LAW AND PRACTICE* 463, 471 (David Golcber et al. eds., 2009) [hereinafter *Cultural Diversity in*

works was also expanded to audiovisual on-demand services.⁹⁷ It was accepted that “[o]n-demand audiovisual media services have the potential to partially replace television broadcasting . . . “ and should therefore “contribute actively to the promotion of cultural diversity” and “where practicable, promote the production and distribution of European works.”⁹⁸ The obligations in Article 13 are applicable to on-demand services and, though having the same rationale, differ from those in Article 16 and 17, as Article 13 is only applicable to broadcasters.⁹⁹ For broadcasters, these obligations concern quotas.¹⁰⁰ On-demand service provider’s obligations are named “soft quotas”¹⁰¹ and are generally described as a non-identical twin.¹⁰² The idea of a level playing field is balanced with the concept of the lighter regime for on-demand services.¹⁰³ Differences in treatment of linear and non-linear services are justified with differences in the choice and control the user can exercise¹⁰⁴ and different stages of market development, where excessive burdens might have a chilling or stifling effect on emerging audiovisual services.¹⁰⁵

Broadcasters must reserve a majority of their transmission time for European works, excluding “time allotted to news, sport events, games, advertising, teletext services and teleshopping.”¹⁰⁶ 10% of this broadcasting time must be reserved for European works created by

Broadcasting]; see also O.J., *Issues Paper for Liverpool Audiovisual Conference: Cultural Diversity and the Promotion of European and Independent Productions* (July 2005) 1–2,

http://ec.europa.eu/avpolicy/reg/history/consult/consultation_2005/index_en.htm.

97. See AVMSD art. 13.

98. *Id.* recital 69.

99. Compare *id.* art. 13, with *id.* arts. 16, 17.

100. *General Principles*, EUR. COMMISSION (July 6, 2015), <https://ec.europa.eu/digital-single-market/en/general-principles>; see also AVMSD arts. 16–17.

101. Oliver Castendyk in EUROPEAN MEDIA LAW, *supra* note 38, at 923, 924.

102. See *Cultural Diversity in Broadcasting*, *supra* note 96, at 474.

103. See AVMSD recital 69.

104. *Id.* recital 58.

105. *Proposal for the AVMSD Revision*, *supra* note 5, at 5, 10 (finding the video-on-demand, streaming, and mobile video markets immature and discussing obligations concerning promotion of European Works as to the possible excessive burdens on service providers).

106. AVMSD art. 16.

producers independent from the broadcasters.¹⁰⁷ There is no analogous provision for on-demand services.¹⁰⁸ Article 13 of the AVMSD imposes on providers of audiovisual on-demand services a general obligation to promote the production of and access to European works.¹⁰⁹ Instead of indicating any minimum quota, the promotion may include financial contribution to the production and acquisition of European works, or “the share and/or prominence” of European works in the catalogues of the audiovisual on-demand media services.¹¹⁰ There are differences in Article 16 and 13 of the AVMSD, resulting in the lighter or softer approach, which means not imposing any quotas to non-linear services.¹¹¹ Both Article 13 and 16 concern European works; however, doubt may arise in the lack of the exclusion for certain transmissions in the case of on-demand services.¹¹² The European Commission explained that it will apply the same exclusion of news, sports events, games, and advertising in the case of on-demand services.¹¹³

Member States have a choice as to what means for promotion of European works they find necessary in the case of on-demand services.¹¹⁴ The approach to implementation of Article 13 in the AVMSD is different in each Member State.¹¹⁵ Some Member States, such as the United Kingdom (UK) or Germany, are sceptical about imposing any fixed

107. *Id.* art. 17.

108. *Compare id.* art. 17, *with id.* arts. 12–13.

109. *Id.* art. 13.

110. *Id.*

111. The idea of “[a] ‘quota system for the Internet’ was heavily contested” Castendyk, *supra* note 101, at 924.

112. Article 16 of the AVMSD contains the exclusion of “time allotted to news, sports events, games, advertising, teletext services and teleshopping” while article 13 does not. *Compare* AVMSD art. 13, *with id.* art. 16.

113. *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: First Report on the Application on Articles 13, 16 and 17 of Directive 2010/13/EU for the Period 2009–2010*, at 4, COM (2012) 522 final (Sept. 24, 2012) [hereinafter *Application of Article 13 in Each Member State*].

114. *See* AVMSD art. 13.

115. *See Executive Summary of the Ex-Post REFIT Evaluation of the Audiovisual Media Services Directive 2010/13/EU*, *supra* note 27, at 36; *see also* VOD, PLATFORM AND OTT, *supra* note 35, at 49–62.

quotas on all audiovisual media service providers.¹¹⁶ In the UK, the Authority for Television on Demand (ATVOD), the co-regulatory authority replaced in January 2016 by the Office for Communication (Ofcom),¹¹⁷ explained that it does not, in view of the Communications Act of 2003, have “the appropriate regulatory authority powers to require service providers to operate a quota system.”¹¹⁸ Thus, ATVOD’s strategy was based on encouraging and collecting information.¹¹⁹ In the information sent to the European Commission for the purpose of preparing the first report on the promotion of European works, Germany explained the specific regulations applicable to on-demand services provided by the public broadcasters where the quotas for linear services are exceeded.¹²⁰ Germany stated it does not consider any further reaching measures for on-demand media service providers practicable.¹²¹ On the other hand, France and Poland provided a detailed implementation, fixing quotas for audiovisual on-demand media service providers.¹²² In France, the specific obligations for on-demand media service providers include providing for 60% of European works and 40% of works in French.¹²³ This level is to be obtained gradually, and some service

116. *Application of Article 13 in Each Member State*, *supra* note 113, at 16–17; *see also* Lorna Woods, *The Proposed New Audiovisual Media Services Directive: Key Features*, MEDIA POL’Y PROJECT BLOG (May 27, 2016), <http://blogs.lse.ac.uk/mediapolicyproject/2016/05/27/the-proposed-new-audiovisual-media-services-directive-key-features-2/>.

117. *Ofcom Brings Regulation of ‘Video-on-Demand’ in-House*, OFCOM (Oct. 14, 2015), <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2015/1520333>.

118. AUTH. FOR TELEVISION ON DEMAND LTD., EUROPEAN WORKS PLAN 2012–2015 2 (2012), https://www.ofcom.org.uk/_data/assets/pdf_file/0018/63315/2012_european_works_plan.pdf.

119. *Id.*

120. *See Application of Article 13 in Each Member State*, *supra* note 113, at 16–17.

121. *Id.*

122. Alexandre Entraygues, *French Solutions*, in VIDEO ON DEMAND AND THE PROMOTION OF EUROPEAN WORKS, *supra* note 34, at 25, 26–28; *see also* VOD, PLATFORM AND OTT, *supra* note 35, at 61.

123. Décret 2010-1379 du 12 Novembre 2010 Relatif aux Services de Médias Audiovisuels à la Demande [Decree 2010-1379 of November 12, 2010 on the Relative On-Demand Audiovisual Media Services], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 12, 2010, art. 12,

providers are excluded if they offer less than twenty audiovisual works.¹²⁴ Quotas are accompanied by the prominence obligation, which references what should be included in the homepage of the service.¹²⁵ Furthermore, French law provides for the financial contribution obligation.¹²⁶ The system of financial contribution is complex and obligations differ depending on the type of the service (catch-up TV, video-on-demand, or subscription-video-on-demand) and on the turnover.¹²⁷ In Poland, the quotas are substantially lower – at least 20% of the catalogue is dedicated for European works, including works in Polish, unless the provider offers no European works at all.¹²⁸ Audiovisual on-demand media service providers should also provide adequate visibility of such programmes in a catalogue. The other obligations concerning promotion include proper identification of origin of a work, providing the option to search for European works, and placing information and materials promoting European works; however, the Broadcasting Act does not specify where these materials should be placed.¹²⁹

Although the first European Commission's report on the application of Article 13 of the AVMSD was inconclusive because of insufficient data, it is clear that there is a great divergence of national solutions.¹³⁰ On the other hand, the European Commission was satisfied with the generally high share of European Works in audiovisual on-demand services.¹³¹ The European Commission has also been working on evaluating and monitoring tools for particular measures of promotion,

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023038244&dateTexte=20160922>; see also VOD, PLATFORM AND OTT, *supra* note 35, at 56.

124. Decree 2010-1379 of November 12, 2010 on the Relative On-Demand Audiovisual Media Services, art. 11.

125. *Id.* art. 13.

126. *See id.* ch. I.

127. *See id.* arts. 1–5.

128. Ustawa o Radiofonii i Telewizji [The Broadcasting Act], Dec. 29, 1992, at arts. 47(f)(2), 47(f)(4) (as amended).

129. *Id.* art. 47(f)(1).

130. *See Application of Article 13 in Each Member State*, *supra* note 113, at 6–7.

131. *Id.* at 7; see also Krisztina Stump, Eur. Comm'n, Promotion of European Works – An Overview of the Current Situation (Feb. 26, 2015), <http://docplayer.net/34543763-Promotion-of-european-works-an-overview-of-the-current-situation.html> (listing examples of providers, such as iTunes, with the highest share of European works per each Member State).

including financial contribution.¹³² The argument against such an obligation is the state of the market development and the possibility that it places too much of a burden on the on-demand media services providers.¹³³ The financial contribution obligation may seem attractive, as it directly connects the obligation imposed in national law with investments in European audiovisual production, leaving editorial freedom as to the choice and genres of particular programmes, within the limits of Articles 16 and 13 of the AVMSD, for media service providers.¹³⁴

The obligation to promote European works form part of a bigger problem of financing audiovisual production in Member States. There is an ongoing discussion about limiting the principle of territoriality in copyright as it may contribute to the partitioning of the EU market.¹³⁵ The availability of certain content, including audiovisual works, may be territorially restricted due to the scope of the licenses for distribution.¹³⁶ On the other hand, the analysis published by the European Audiovisual Observatory leads to the conclusion that seeing territoriality as an obstacle in the digital single market puts the mechanism of financing European production into question given the downward trend in financing audiovisual works.¹³⁷ Pre-sale of rights in audiovisual works on a territorial basis is very important.¹³⁸ The subsidy finance model is of great importance in the EU, and it is noted that often the financing of audiovisual production is a combination of three models – pre-sale of

132. *Id.*

133. *Id.*

134. See Eur. Comm'n, Questionnaire of the Tools Used in the Application of Article 13 AVMSD (Promotion of European Works in the On-Demand Services) (Nov. 13, 2013), <http://ec.europa.eu/digital-agenda/en/news/promotion-european-works-demand-services-contributions-audiovisual-regulators>.

135. See P. BERNT HUGENHOLTZ, MAKING THE DIGITAL SINGLE MARKET WORK FOR COPYRIGHT: EXTENDING THE SATELLITE AND CABLE DIRECTIVE TO CONTENT SERVICES ONLINE 1–2 (2016); see also Peter Yu, *A Seamless Global Digital Marketplace of Entertainment Content* 9 (Tex. A&M Univ. Sch. of L., Research Paper No. 17–45, 2016); see generally Jacklyn Hoffman, *Crossing Borders in the Digital Market: A Proposal to End Copyright Territoriality and Geo-Blocking in the European Union*, 49 GEO. WASH. INT'L L. REV. 143 (2016).

136. See TERRITORIALITY AND ITS IMPACT ON THE FINANCING OF AUDIOVISUAL WORKS, *supra* note 90, at 28.

137. *Id.* at 25.

138. *Id.* at 18.

rights, subsidies, and the investors' funds.¹³⁹ State film funding systems are based mainly on the territorial approach.¹⁴⁰

Within the framework of the AVMSD, it is possible for Member States to impose an obligation to financially contribute to the production of European works for on-demand service providers.¹⁴¹ The service providers under the jurisdiction of one Member State must comply only with the obligations imposed by that Member State (within the areas coordinated by the AVMSD).¹⁴² Furthermore, if the providers do not fulfill their obligations to promote European works—for example, the share of European works is lower than prescribed in national law or the prominence is found insufficient—audiovisual media service providers cannot be restricted from offering the service in other Member States.¹⁴³ In the case of broadcasters, there are only two possibilities to derogate from the country of origin principle—if the broadcasters violate Article 6 on the prohibition of incitement to hatred or Article 27 on the standards for the protection of minors.¹⁴⁴ In the case of on-demand service providers, the possibilities to derogate from the country of origin principle are more flexible¹⁴⁵ and are identical to those of Article 3(4) of the E-Commerce Directive.¹⁴⁶ These provisions do not, however, include the cultural policy objectives.¹⁴⁷

Taking into account that the obligations of audiovisual media service providers substantially differ, the danger of delocalisation arises.¹⁴⁸ Major global players in the video-on-demand market tend to establish themselves in the countries with low investment obligations.¹⁴⁹ The

139. *Id.* at 20.

140. *Id.* at 20 n.38.

141. AVMSD recital 69.

142. *Id.* art. 2.

143. *See id.* art. 3(6).

144. *Id.* art. 3(2)(a).

145. *See id.* art. 3(4).

146. *Compare id.* art. 3(4), with E-Commerce Directive art. 3(4).

147. Michael A. Wagner, *Revisiting the Country-of-Origin Principle in the AVMS Directive*, 6 J. OF MEDIA L. 286, 289 (2014) (“there should be no doubt that cultural and linguistic diversity . . . are legitimate ‘public policy’ objectives.”); *see also* AVMSD art 3(4).

148. *See* Wagner, *supra* note 147, at 287 (discussing the Netflix example); *see also* VOD, PLATFORM AND OTT, *supra* note 35, at 46.

149. TERRITORIALITY AND ITS IMPACT ON THE FINANCING OF AUDIOVISUAL WORKS, *supra* note 90, at 25.

major global players include Netflix, iTunes, and Amazon.¹⁵⁰ In the European Commission's documents accompanying the proposal for the revision of the AVMSD, it was noted that "some Member States intend to make on-demand service providers that are not under their jurisdiction contribute financially to European works if they target consumers in their territory" and that calls into question the operation of the AVMSD.¹⁵¹ Substantial amendments to Article 13 of the AVMSD were thus proposed.¹⁵² In this proposal, the obligation of promotion of European works would be strengthened by introducing a quota of a minimum of 20% per share in the catalogue of European works.¹⁵³ Furthermore, this proposal specifies that Member States may require providers under their jurisdiction to contribute financially to the production of European works including via direct investment in content and contributions to national funds.¹⁵⁴ Moreover, a Member State may require a provider established in a different Member State but targeting the audience of that Member State to contribute financially, limited by the revenues generated in the targeted Member State.¹⁵⁵ Introduction of such a major change in the basic principle of coordination of national media regulations is justified by the different cultural policies of the Member States and the need to "ensure adequate levels of investment [in] European works."¹⁵⁶ The proposed provisions are accompanied with explanations as to what targeting the territory of a Member State means and restrictions relating to the double burden and low turnover.¹⁵⁷ The European Commission is

150. *Impact Assessment*, *supra* note 19, at 40. The Commission found no point in extending the application of the AVMSD to video-on-demand providers established in third countries, such as the U.S., because most of them have a subsidiary in an EU Member State. *See id.*

151. *Id.* at 8.

152. *Proposal for the AVMSD Revision*, *supra* note 5, at 28 (proposed art. 1(15)).

153. The Council agreed to a 30% quota on May 23, 2017. Ivana Katsarova, *Briefing EU Legislation in Progress: The Audiovisual Media Services Directive*, EUR. PARLIAMENTARY RES. SERV. (June 27, 2017), http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583859/EPRS_BRI%282016%29583859_EN.pdf.

154. *Id.*

155. *Id.*

156. *Proposal for the AVMSD Revision*, *supra* note 5, at 18 (proposed recital 22).

157. *See id.* (proposed recital 22).

of the opinion that this proposal does not undermine the single market objectives or the country of origin principle.¹⁵⁸

The opinion that the changes proposed in the AVMSD are in line with the country of origin principle is supported by both the European Commission's decision on the German film production and the compatibility of distribution funding scheme with Article 108 (2) of TFEU. In the assessment of the funding scheme, the issue of the compatibility with Articles 2, 3, and 13(1) of the AVMSD was raised.¹⁵⁹ The European Commission eventually found that "the validity of the application of the tax to certain [video-on-demand] providers which provide their services from locations outside Germany is not called into question by Directive 2010/13/EU in particular."¹⁶⁰ The European Commission noted the proposal for the revision of the AVMSD and found that the revision provides the necessary clarifications supporting the view and that such measures are compatible with the AVMSD.¹⁶¹ Referring to the binding provisions of the AVMSD, the European Commission stated that Article 13 cannot, in the context of this particular decision, "be considered as attributing an exclusive competence to the Member State where the provider is established for the taxation of on-demand media service providers so as to contribute to the production and rights acquisition of European works."¹⁶² The European Commission noted earlier that "Member States have the exclusive jurisdictional authority over audiovisual media services providers established in their territory."¹⁶³ Thus, it appears that the logical explanation of that point of view would be accepting the German position that the tax in question is not within the scope of the coordinated fields in the AVMSD.¹⁶⁴ This

158. *Impact Assessment*, *supra* note 19, at 29.

159. C 437/57, of the European Commission of 5 December 2014 on the State Aid — Germany, 2014, at 59–60, O.J. (C 437) [hereinafter State Aid — Germany].

160. Commission Decision on the Aid Scheme, SA.38418 - 2014/C (ex 2014/N), 2016 O.J. (C 5551) ¶ 62 (the English version is for informative purposes only) [hereinafter Aid Scheme].

161. *See id.* ¶ 63.

162. *Id.* ¶ 59.

163. State Aid — Germany, *supra* note 159, at 58.

164. *But see* VOD, PLATFORM AND OTT, *supra* note 35, at 48. This issue should involve further analysis of the concept of a coordinated field, in light of *Konsumentombudsmannen v. De Agostini*, C-34/95, C-35/95, and C-36/95, ECLI, ¶ 1

position is inconsistent with the clarifications in the proposal for a revision if, as a result, imposing such financial obligations is found to be one of the means of the promotion of European works. The reasoning of the European Commission raises serious doubts as to the compatibility with the currently binding AVMSD.¹⁶⁵

The proposal of the AVMSD revision clearly aims at reducing the danger of delocalisation by establishing the common minimum standard for a share in catalogue and, controversially, taking a step back from the country of origin principle.¹⁶⁶ Even with European works, an on-demand service provider could not escape financial contribution obligations if services offered by that provider were targeting Member States that provide for such an obligation.¹⁶⁷ From the perspective of fundamental freedoms, imposing financial burdens can be treated as an obstacle in trade in light of the CJEU's rulings.¹⁶⁸ Yet, such an amendment would allow Member States' active cultural policy not undermined by the principle of free movement of services. As it is reported, Germany explained the amendments in the funding scheme with the technological development and activities of "major global [video-on-demand] players[,] which serve different countries from a single establishment."¹⁶⁹ If it is accepted that territoriality plays a fundamental role in the financing of audiovisual works and keeps European audiovisual industry going, then it is within this logic to limit the country of origin principle.

Altogether, the provisions on the promotion of the European works lead to a certain paradox of protecting a fragmented European market within a single market for audiovisual services and within the act aiming

(Jul. 9, 1997), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CJ0034>.

165. See VOD, PLATFORM AND OTT, *supra* note 35, at 73.

166. See Wagner, *supra* note 147, at 291–94 (discussing the arguments for revisiting the country of origin principle submitted before the proposal for a revision of the AVMSD was published).

167. See *Proposal for the AVMSD Revision*, *supra* note 5, at 16 (proposed art. 13).

168. See Case C-225/15, Politanò, CURIA (Sept. 8, 2016), ¶ 37, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183123&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=408675> (“measures which prohibit, impede or render less attractive the exercise of the freedoms guaranteed by Articles 49 TFEU and 56 TFEU.”).

169. VOD, PLATFORM AND OTT, *supra* note 35, at 72.

at generally liberalizing freedom to provide services. In this particular case, the economic and cultural reasons are very hard to disentangle.

V. VIDEO SHARING PLATFORMS

The lack of a level playing field is perceived by the European Commission as a problem, not only regarding the promotion of European works, but also in the sphere of the protection of minors.¹⁷⁰ The analysis of the European Commission's proposal to amend the AVMSD leads to the conclusion that there are two main issues to be dealt with in the sphere of the protection of minors.¹⁷¹ The first issue is revising the provisions applicable to audiovisual media services to ensure a uniform approach to linear and non-linear services.¹⁷² The second issue is adding new provisions on the video sharing platforms services to ensure the level playing field between audiovisual media services and other services with video content.¹⁷³

There are currently separate and differing provisions concerning the protection of minors in television broadcasting and on-demand services.¹⁷⁴ Seriously harmful content cannot be broadcast at all, but it can be offered on-demand with effective access restrictions.¹⁷⁵ The content, which is likely to impair the development of minors, is subject to restrictions in broadcasts, but those restrictions do not apply to on-demand services.¹⁷⁶ The proposal aims at reducing these disparities by

170. *Impact Assessment*, *supra* note 19, at 7.

171. *See Proposal for the AVMSD Revision*, *supra* note 5, at 2.

172. *See id.* at 28 (proposed art. 12). Article 12 effectively deletes chapter VII of the AVMSD on the protection of minors in television broadcasting. *Id.*

173. *See id.* at 18, 29–30. This issue is addressed in the new proposal for the AVMSD in recital 26 and article 28(a), which concern video sharing platforms. *Id.*

174. *See* Alexander Scheuer & Cristina Bachmeier, *The Protection of Minors in the Case of New (Non-Linear) Media: European Legal Rules and Their National Transposition and Application*, in PROTECTION OF MINORS AND AUDIOVISUAL CONTENT ON-DEMAND 11 (Susanne Nikoltchev ed., 2012).

175. *Compare* AVMSD art. 12, *with id.* art. 27(1). According to article 12, the services “which might seriously impair the . . . development of minors” are only made available in such a way to ensure that minors will not normally hear or see such on-demand audiovisual services. *Id.* art. 12.

176. Programmes that are likely to impair the development of minors cannot be included in broadcasts unless “it is ensured [that] by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear

deleting the current Article 27 of the AVMSD, applicable solely to non-linear services, and provide for a uniform approach in a modified Article 12.¹⁷⁷ According to the proposed Article 12 of the AVMSD, the content that “may impair the physical, mental or moral development of minors” would only be made available, in any audiovisual media service, in such a way as to ensure that minors will not normally hear or see it.¹⁷⁸ Thus, the minimum requirements for the providers of on-demand services would be raised.¹⁷⁹ On the other hand, it stems from the comparison of the currently binding Article 27 of the AVMSD and the proposed Article 12 that the rules for broadcasters would be liberalized to a certain extent as “[t]he most harmful content” would be subject to the strictest measures, including encryption and effective parental control, but not the ban the dissemination of this harmful content.¹⁸⁰ Some examples of “[t]he most harmful content” are “gratuitous violence and pornography.”¹⁸¹ The examples are thus identical to the examples of what is currently described as programmes that “might seriously impair” the development of minors.¹⁸² The difference in the wording between Article 12 and 27 of the AVMSD and the proposal is, in my opinion, less important than the difference in the approach to linear and non-linear services. A lighter regime for on-demand services was explained in the AVMSD by the fact that the user has more choice and control over the content of these services.¹⁸³ The objective of Article 12 of the AVMSD is that minors do not have access to the most harmful content.¹⁸⁴ This rationale would, after the amendments, be applicable also to broadcasting

or see such broadcasts.” *Id.* art. 27. There is no reference to content “likely to impair” minors in article 12. *See id.* art. 12; *see also* Jörg Ukrow, *Provisions Applicable to On-Demand Audiovisual Media Services*, in *EUROPEAN MEDIA LAW*, *supra* note 38, at 919, 920.

177. *See Proposal for the AVMSD Revision*, *supra* note 5, at 28 (proposed art. 12).

178. *Id.* (proposed art. 12).

179. *Compare id.* (proposed article 12), with AVMSD art. 12.

180. *Proposal for the AVMSD Revision*, *supra* note 5, at 28 (proposed art. 12).

181. *Id.* (proposed art. 12).

182. *Compare* AVMSD art. 12 (referring to programmes “which might seriously impair the physical, mental or moral development of minors”), with art. 27 (referring to programmes “which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence”).

183. AVMSD recital 58.

184. *See id.* art. 12 (defining most harmful content as content that will “seriously impair the physical, mental or moral development” of the minor).

services, which may be justified by the blurring boundaries between different services¹⁸⁵ and the fact that many viewers are accessing various audiovisual services via portable devices.¹⁸⁶

In the Regulatory Fitness and Performance (REFIT) evaluation,¹⁸⁷ the European Commission identified the main problems in the regulatory framework for audiovisual services, which led to the proposal for the AVMSD revision.¹⁸⁸ The first issue listed is the lack of sufficient protection of minors and consumers when they are using video sharing platforms.¹⁸⁹ Bringing the video sharing platforms into the scope of the AVMSD forms an important part of the revising proposal.¹⁹⁰ The general idea is to impose certain obligations on platform providers without changing the legal framework of the E-Commerce Directive, particularly Article 14 on the exemption of liability of hosting providers and Article 15 preventing Member States from imposing any general obligation to monitor content on providers offering services specified in Articles 12, 13, and 14 of the E-Commerce Directive.¹⁹¹

The European Commission points out that user-generated content is subject to different rules and different levels of consumer protection while particularly young consumers access the video content on internet, including video sharing platforms.¹⁹² It is proposed to define “user-generated video” as “a set of moving images with or without sound constituting an individual item that is created and/or uploaded to a video sharing platform by one or more users,” and the “video sharing platform

185. See *Audiovisual Media Services and Connected Devices: Past and Future*, *supra* note 78, at 10.

186. *Proposal for the AVMSD Revision*, *supra* note 5, at 2. Changes in the market for audiovisual services justify the need for the revision of the AVMSD, as explained in recital 1 of the proposal. *Id.*

187. *REFIT Evaluation and Impact Assessment of the EU Audiovisual Media Services Directive 2010/13/EU (AVMSD)*, at 2, 5 (Oct. 2015), http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_cnect_006_cwp_review_avmsd_ia_en.pdf (assessing “the overall function of the AVMSD in . . . light of recent developments of the market, technology and consumption patterns.”).

188. *Proposal for the AVMSD Revision*, *supra* note 5, at 2.

189. *Impact Assessment*, *supra* note 19, at 4.

190. See *id.* at 5.

191. E-Commerce Directive recitals 12–14; see also *Proposal for the AVMSD Revision*, *supra* note 5, at 3.

192. See *Proposal for the AVMSD Revision*, *supra* note 5, at 2.

service” as a service.¹⁹³ The principal purpose of which, or of the dissociable section thereof, is the provision of “programmes [or] user-generated videos to the general public, in order to inform, entertain or educate;”¹⁹⁴ consisting of the storage of large amount of programmes or user-generated videos for which the video sharing platform provider does not have editorial responsibility but determines the organisation of the stored content, including, by the use of “automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing.”¹⁹⁵

Video sharing platform services, in the light of the proposal, would not be audiovisual media services but would form a separate category covered by the amended AVMSD. In comparison with the definition of an audiovisual media service, it can be noted that the principal purpose of the video sharing platform services is the provision not only of programmes but also of user-generated video.¹⁹⁶ The relation between programmes and user-generated videos in the proposed definitions is unclear.¹⁹⁷ It seems possible that a programme broadcasted on television, and subsequently uploaded by users of a video sharing platform, could constitute user-generated content.¹⁹⁸

In the proposed definition of a video sharing platform, there is no requirement of editorial responsibility, which is crucial for audiovisual media services.¹⁹⁹ The only condition is that the content should be organised by the provider.²⁰⁰ Editorial responsibility is defined as “the exercise of effective control both over the selection of the programmes and over their organisation.”²⁰¹ According to the proposed definition, the video sharing platform providers also organize content, but without editorial responsibility.²⁰² The main difference is the possible automatic process of organisation, which is different from traditional media services. It can be understood that the definition is broad enough to cover platforms dedicated solely to video content, like social media if there is a

193. *Id.* at 22. (proposed art. 1)

194. *Id.* (proposed art. 1).

195. *Id.* (proposed art. 1).

196. *See id.* (proposed art. 1).

197. *See id.* (proposed art. 1).

198. *See id.* (proposed art. 1).

199. *See id.* (proposed art. 1).

200. *See id.* (proposed art. 1).

201. AVMSD art. 1(1)(c).

202. *Proposal for the AVMSD Revision*, *supra* note 5, at 22 (proposed art. 1).

video section. The understanding of a dissociable section could be based on the CJEU's interpretation in the *New Media Online* case even though the case referred to audiovisual media services.²⁰³

Because video sharing platforms would be a separate category of services, a new chapter dedicated solely to those services is proposed to be added in the revised AVMSD.²⁰⁴ The general obligations imposed on the video sharing platform providers would be to

protect minors from content which may impair their physical, mental or moral development [and to] protect all citizens from content containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin.²⁰⁵

There are no specific consumer-related issues that have to be dealt with as the European Commission pointed out that commercial communications on video sharing platforms are already regulated in other directives concerning consumer protection.²⁰⁶ The obligation of the Member States, in the sphere of the protection of minors, is to ensure that platform providers take appropriate measures to fulfil those obligations, and there is further guidance as to what constitutes “appropriate measures” in the proposed Article 28(a) and the preamble of the proposed AVMSD.²⁰⁷ Though the AVMSD generally recommends self-regulation and co-regulation as a means to achieve the objectives of the Directive,²⁰⁸ co-regulation is clearly the preferable option in the case of

203. *Id.* at 15 (proposed recital 3); *see also* *New Media Online*.

204. *See Proposal for the AVMSD Revision, supra* note 5, at 29–33 (proposed ch. IXa).

205. *Id.* at 29 (proposed art. 28).

206. *See id.* at 18–19. Recital 27 names the Directive 2005/29/EC of the European Parliament and of the Council prohibiting unfair commercial practices, the Directive 2003/33/EC of the European Parliament and of the Council, and the Directive 2014/40/EU of the European Parliament and of the Council with regard to tobacco and related products. *Id.*

207. *See id.* at 19–20 (this is set out in recitals 28–32).

208. AVMSD recital 44; *see generally* Eva Lievens et al., *The Co-Protection of Minors in New Media: A European Approach to Co-Regulation*, 10 U.C. DAVIS J. JUV. L. & POL'Y 97 (2006) (discussing a broader analysis of co-regulation in the media); *see also* KATARZYNA KŁAFKOWSKA-WAŚNIEWSKA, SWOBODNY PRZEPLYW AUDIOWIZUALNYCH

video sharing platforms.²⁰⁹ The objective is “to involve video-sharing platform providers” and to ensure the adequate protection of fundamental rights, such as “the right to respect for private and family life and the protection of personal data, the freedom of expression and information, [and] the freedom to conduct business.”²¹⁰ Some tools, such as reporting, flagging mechanisms, age verification systems, or parental control systems are listed as possible measures to ensure protection by video sharing platform providers.²¹¹ The provisions proposed in the area of protection of minors on the video sharing platforms should be complementary to those of the E-Commerce Directive.²¹² The European Commission noted that the E-Commerce Directive does not deal with the harmful content but only with illegal content.²¹³ In the case of illegal content, according to the proposal for a revision of the AVMSD, it would still be possible to impose stricter measures than those provided for in the AVMSD according to the applicable EU law framework.²¹⁴ In the case of harmful content, the result of the revised AVMSD should be that video sharing platform providers “take appropriate measures to protect minors” when accessing content.²¹⁵

The European Commission is of the opinion that Articles 14 and 15 of the E-Commerce Directive remain intact as the proposal limits imposing

USLUG MEDIALYNCH NA ŽADANIE W UNII EUROPEJSKIEJ [FREE CIRCULATION OF ON-DEMAND AUDIOVISUAL MEDIA SERVICES IN THE EUROPEAN UNION] 64–74 (2016) [hereinafter FREE CIRCULATION OF ON-DEMAND AUDIOVISUAL MEDIA SERVICES IN THE EUROPEAN UNION]. The general approval for self- and co-regulatory measures is sustained with certain clarifications in the proposed amendments. See *Proposal for the AVMSD Revision*, *supra* note 5, at 16.

209. See *Proposal for the AVMSD Revision*, *supra* note 5, at 30 (proposed art. 28(a)(3)).

210. *Id.* at 19–20 (proposed recitals 30–31).

211. *Id.* at 29 (proposed art. 28(a)(2)).

212. *Id.* at 3.

213. *Impact Assessment*, *supra* note 19, at 5.

214. *Proposal for the AVMSD Revision*, *supra* note 5, at 30 (proposed art. 28(a)(5)). The applicable legal framework is formed by article 14 and 15 of the E-commerce Directive and article 25 of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. See E-Commerce Directive arts. 14, 15; see generally Directive 2011/92/EU, of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA, 2011 O.J. (L 335).

215. *Proposal for the AVMSD Revision*, *supra* note 5, at 19 (proposed recital 28).

obligations only to “the organisational sphere[,] and do not entail liability for any illegal information stored on the platforms as such.”²¹⁶ The issues of control over content available on a platform are separate but coherent for the purpose of the AVMSD and the E-Commerce Directive.²¹⁷ The provider of a service is subject to the AVMSD provisions only if such control amounts to editorial responsibility.²¹⁸ If the provider has no control over content it may qualify as a host provider within the framework of Article 14 of the E-Commerce Directive.²¹⁹ In light of the proposed AVMSD revision, the question is could the video sharing platform provider still invoke Article 14 of the E-Commerce Directive when it would be obliged to certain activities in the sphere of protection of minors. It seems that the European Commission’s answer is yes, as it is phrased in the preamble to the proposed revision of the AVMSD that the “appropriate measures should relate to the organisation of the content and not to the content as such.”²²⁰ The key question is what will be the final scope of the obligations of video sharing platform providers and would it amount only to offering some tools for users who would control the content.

The problem of video content that is harmful to minors is not limited to audiovisual media services or video sharing platforms but is a general problem in the information society services and the Internet.²²¹ The E-Commerce Directive obliges the European Commission and the Member

216. *Id.* at 13.

217. See Peggy Valcke & Jef Ausloos, *Television on the Internet: Challenges for Audiovisual Media Policy in a Converging Media Environment*, in POLICY AND MARKETING STRATEGIES FOR DIGITAL MEDIA 24, 28 (Yu-li Liu & Robert G. Picard eds., 2014).

218. See AVMSD art. 1(1)(a)(i) (requiring all criteria of the definition of audiovisual media services from article 1(1)(a)(i) of the AVMSD to be satisfied).

219. See cases cited *supra* at notes 41, 60, 73, 76, & 83; see also E-Commerce Directive art. 14.

220. *Proposal for the AVMSD Revision*, *supra* note 5, at 19 (proposed recital 29).

221. Scheuer & Bachmeier, *supra* note 175, at 9–11; see also EVA LIEVENS, PEGGY VALCKE, & DAVID STEVENS, PROTECTING MINORS AGAINST HARMFUL MEDIA CONTENT: TOWARDS A REGULATORY CHECKLIST 1, <http://www.law.kuleuven.be/citip/en/docs/publications/712cybersafety-elievens-200509082f90.pdf> (last visited Oct. 17, 2017); see also IVANA KATSAROVA, PROTECTION OF MINORS IN THE MEDIA ENVIRONMENT: EU REGULATORY MECHANISMS 1–2 (2013), [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130462/LDM_BRI\(2013\)130462_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130462/LDM_BRI(2013)130462_REV1_EN.pdf).

States to promote codes of conduct in the sphere of the protection of minors and human dignity.²²² The proposed AVMSD revision goes a step further but only in the case of video sharing platforms.²²³ As a result, harmful video content disseminated other than by audiovisual media services or video sharing platforms would remain outside the scope of the AVMSD.²²⁴ The European Commission justifies the focus on the platforms with a rise in a consumption of videos on such platforms and a parallel rise in concern as reported by consumer organisations.²²⁵ The role of platform operators is intermediary in this case and imposing obligations on intermediaries should indirectly result in limiting users' activity in disseminating harmful audiovisual user-generated content. The changes in the area of the protection of minors are proposed within the context of the AVMSD and not the E-Commerce Directive, as the AVMSD has been the main European Union law on the regulation of content.²²⁶ The experience with the implementation of the AVMSD so far is that in some Member States the expansion of the scope of the regulated services to on-demand sector resulted in more activity of national regulatory authorities, like CSA in France, the National Broadcasting Council (KRRiT) in Poland, or Ofcom in the UK when it replaced the former co-regulatory authority ATVOD.²²⁷ Imposing obligations concerning protection of minors upon Member States and platform operators may result in further activities of national regulatory authorities in the area of internet communication. The experience of

222. E-Commerce Directive art. 16(1)(e).

223. See *Proposal for the AVMSD Revision*, *supra* note 5, at 29–30 (proposed art. 28(a)).

224. See generally Recommendation of the European Parliament and of the Council of 20 December 2006 on the Protection of Minors and Human Dignity and on the Right of Reply in Relation to the Competitiveness of the European Audiovisual and On-Line Information Services Industry, 2006 O.J. (L 378). The Recommendation is horizontally applicable but is not a measure of harmonisation and is not binding upon the Member States. *Id.*

225. *Proposal for the AVMSD Revision*, *supra* note 5, at 18–19 (proposed recitals 26–27).

226. AVMSD should complement the E-Commerce Directive. See *id.* at 3.

227. See FREE CIRCULATION OF ON-DEMAND AUDIOVISUAL MEDIA SERVICES IN THE EUROPEAN UNION, *supra* note 208, at 358–84.

different Member States, such as Germany²²⁸ or co-regulation in the UK²²⁹ is of great importance for further discussion.

VI. CONCLUSION

In order to provide cross-border services in the EU market and to profit out of the country of origin principle, audiovisual service providers must comply with the rules of the game established in the AVMSD and, to some extent, the E-Commerce Directive. In light of fair competition and non-discrimination principles, complementing the single market project, the idea of a level playing field means treating all like services, and their service providers acting on the EU market, the same. This idea should not be objected as such; however, it cannot be accepted as an all explaining formula. With this approach, the focus is more on the issue of protection of certain values common to Member States and the common European market for audiovisual production than on eliminating all barriers in trade.²³⁰ It can be accepted that removing the barriers in the cross-border provision of services was the focus at an initial stage of building the single market.²³¹ The legislation now reflects the move to the next step of raising and expanding common standards in the media regulation of Member States, as a result of a primarily coordinative action at the EU law level.

The importance of a level playing field was indicated in the AVMSD, together with the basic principles of the internal market, in the context of explaining why a basic tier of the rules concerning audiovisual content should be applicable to on-demand services.²³² The call to level the playing field in the market for audiovisual services is repeated in the

228. See Scheuer & Bachmeier, *supra* note 175, at 13–16; see also FREE CIRCULATION OF ON-DEMAND AUDIOVISUAL MEDIA SERVICES IN THE EUROPEAN UNION, *supra* note 208, at 388–99; see also ON-DEMAND SERVICES AND THE MATERIAL SCOPE OF THE AVMSD, *supra* note 75, at 44.

229. See FREE CIRCULATION OF ON-DEMAND AUDIOVISUAL MEDIA SERVICES IN THE EUROPEAN UNION, *supra* note 208, at 388–89.

230. In the Explanatory Memorandum, the European Commission points to the “focus on the scope of application of the AVMSD and on the nature of the rules applicable to all market players.” *Proposal for the AVMSD Revision*, *supra* note 5, at 2.

231. Kathrin Böttcher, *Community Policies*, in EUROPEAN MEDIA LAW, *supra* note 38, at 85, 90–91.

232. AVMSD recital 10.

headings of the European Commissions Impact Assessment document as a problem identified in the single market.²³³ The idea of how to provide for a level playing field is further elaborated on in the proposal for the AVMSD revision discussed in this article.²³⁴ In the European Commission's documents, this idea is directly linked to the obligations concerning promotion of European works and protection of minors. The broad picture painted in the proposal for the AVMSD revision is that audiovisual on-demand media service providers are brought more in line with broadcasters, and video sharing platform operators are brought more in line with the audiovisual media service providers.²³⁵ The logic behind this is that there is a provider of a particular category of services who needs to comply with obligations harmonised in EU law, and the control is on the part of the Member States, most often through national regulatory authorities but with more focus on co-regulation.²³⁶

The analysis in this article leads to the conclusion that the idea of a level playing field is also indirectly linked to the application of the country of origin principle,²³⁷ which is expressly invoked in the context of video sharing platforms.²³⁸ As the information society providers, video sharing platforms are subject to Article 3 of the E-Commerce Directive.²³⁹ If they are established in a Member State, the providers of information society services should comply with the national provisions applicable in that Member State in the fields coordinated by the E-Commerce Directive. Other Member States may not, for reason falling within the coordinated field, restrict the freedom to provide information society services coming from other Member States.²⁴⁰ The proposal for the revision of the AVMSD includes adding a clarification that the same rules should be applicable to providers without an establishment in a Member State, "but which have a parent company, a subsidiary or another entity of the same group with such an establishment."²⁴¹ This

233. See *Impact Assessment*, *supra* note 19, at 7.

234. *Proposal for the AVMSD Revision*, *supra* note 5, at 10, 12.

235. See discussion *supra* Sections IV, V.

236. See *Proposal for the AVMSD Revision*, *supra* note 5, at 29–30 (proposed art. 28(a)).

237. *Impact Assessment*, *supra* note 19, at 3.

238. *Proposal for the AVMSD Revision*, *supra* note 5, at 20 (proposed recital 32).

239. *Id.*; see also E-Commerce Directive art. 3.

240. E-Commerce Directive art. 3.

241. *Proposal for the AVMSD Revision*, *supra* note 5, at 13.

solution, extending the obligation to comply with the rules of a Member State, is explained with a need to level the playing field.²⁴² According to Article 3(4) of the E-Commerce Directive, provisions of information society services may be restricted based on the need to protect minors.²⁴³ It is unclear from the proposal what the relationship between the application of Articles 3(4)(a)(i) and the obligations concerning the protection of minors imposed on the video sharing platform providers in the revised AVMSD would be. The question is – would it be possible to restrict the provision of services in the case when a video sharing platforms provider complies with the obligations resulting from the AVMSD? The maximum level of harmonisation in the AVMSD should prevent such situations,²⁴⁴ although the question about the future relations between the AVMSD and the E-Commerce Directive remains. Similar problems exist in the case of audiovisual on-demand media providers. The AVMSD imposes minimum obligations concerning the protection of minors for on-demand media service providers and allows the Member States to restrict the free provision of services in the identical cases as in Article 3(4) of the E-Commerce Directive.²⁴⁵ The proposal for a revision clarifies with respect to the protection of minors that provisional derogation from the country of origin principle is possible if an audiovisual media service provider under the jurisdiction of another Member State gravely infringes Article 12 concerning the protection of minors.²⁴⁶ This proposal should be approved, and, as it would be applicable to all audiovisual media service providers, it is another example of levelling the playing field in the context of legislative framework. The procedures and conditions for restricting the free

242. *See id.* at 20 (referring to proposed recital 32).

243. E-Commerce Directive art. 3(4)(a)(i).

244. *See Proposal for the AVMSD Revision, supra* note 5, at 29 (proposed art. 28(a)) (stating Member States shall not impose stricter measures than those provided in article 28(1) and (2)).

245. AVMSD art. 3(1) (stating that “Member States shall ensure freedom of reception . . . [of] services from other Member States for reasons which fall within the fields coordinated by the Directive.”). Article 3(4) provides for possible derogations from that principle and is identical to article 3(4) of the E-Commerce Directive. *Compare id.* art. 3(4), with E-Commerce Directive art. 3(4).

246. *Proposal for the AVMSD Revision, supra* note 5, at 23 (proposed art. 3(2)).

movement of services should also be the same for linear and non-linear services, as proposed by the European Commission.²⁴⁷

The impact of a level playing field objective on the application of the country of origin principle may be observed also in the case of the promotion of European works. It became unquestioned in the AVMSD that on-demand audiovisual media service providers should contribute significantly to the European audiovisual production sector.²⁴⁸ The express obligation to contribute financially despite fulfilling the obligations imposed in the Member State that has jurisdiction over the service provider can be perceived as an obstacle in the single market because additional obligations may deter providers from offering services in other Member States. The proposal for a revision of the AVMSD assures the compatibility of such national measures with the AVMSD, pointing to the goal ensuring adequate level of investment in European works.²⁴⁹ As the European Commission explained in the decision on the film funding scheme in Germany, “[a]n interpretation according to which the country of origin principle, as laid down in Article 2(1) of Directive 2010/13/EU, applies to a tax such as the one in question, leads to situations in which providers active on the same market are not subject to the same obligations.”²⁵⁰ In this case, it is submitted that providers active on the same market, meaning the market of one Member State, should be subject to the same obligations.²⁵¹ It is similar to the logic of a level playing field, although not in the EU single market but in the market of one Member State, and as such is surprising in the application of EU law. As a discussion on building “a media framework for the 21st century”²⁵² continues, it is important to pay particular attention to the coherence of the European Commission

247. *Id.* at 15 (referring to proposed recital 6). However, conflicting situations are mostly handled on an informal bilateral basis. TERRITORIALITY AND ITS IMPACT ON THE FINANCING OF AUDIOVISUAL WORKS, *supra* note 90, at 39–40.

248. AVMSD recital 69.

249. *See Proposal for the AVMSD Revision*, *supra* note 5, at 18 (proposed recital 22).

250. Aid Scheme, *supra* note 160, ¶ 60.

251. *Id.*

252. *Infographic: Audiovisual Media Services Directive (AVMSD): A Media Framework for the 21st Century*, EUR. COMMISSION (June 3, 2016), <https://ec.europa.eu/digital-single-market/en/news/infographic-audiovisual-media-services-directive-AVMSD-media-framework-21st-century>.

proposal with the objectives of the single market. It is furthermore interesting to observe how the idea to level the playing field is understood from academic proposals that reflect on a complete level playing field for electronic and print media²⁵³—through the current AVMSD approach of categorising services with editorial responsibility and imposing different sets of obligations in the area of the protection of minors and the promotion of European works, to a more unified approach²⁵⁴ proposed in the AVMSD revision.

253. *The Audiovisual Media Services Directive Unraveled at the Dawn of the Digital Public Sphere*, *supra* note 34, at 152.

254. This unified approach includes another step in deregulation of broadcasts by lowering the standards applicable to television broadcasts. See Peggy Valcke & David Stevens, *Graduated Regulation of 'Regulatable' Content and the European Audiovisual Media Services Directive: One Small Step for the Industry and One Giant Leap for the Legislator?*, 24 *TELEMATICS & INFORMATICS* 285, 287 (2007). It was pointed out in the context of the AVMSD enactment that deregulation would be one way to accomplish the unified approach. *See id.*

